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No. 03-724

In the Supreme Court of the United States

F. HOFFMAN-LAROCHE, LTD., ET AL.,

Petitioners,

v.

EMPAGRAN, S.A., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ROY T. ENGLERT, JR.*
DONALD J. RUSSELL
MAX HUFFMAN
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States (the Chamber) is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

The Organization for International Investment (OFII) is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. OFII's member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world. Like the Chamber, and sometimes together with the Chamber, OFII regularly files briefs as *amicus curiae* in cases such as this one that raise issues of vital concern to the global business community.

Amici Chamber and OFII are well situated to brief the Court on the views of member companies collectively responsible for a substantial portion of total U.S. economic activity with respect to the issues on which the Court has granted

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of this brief.

certiorari. Those members and their corporate affiliates include companies that are buyers and sellers of goods imported into the United States, buyers and sellers of goods exported from the United States, and buyers and sellers in commerce occurring wholly within the United States as well as wholly outside of the United States. In an era of increasing global trade, *amici*'s members share a common interest in the development and preservation of stable and predictable international and domestic laws that allow them to conduct business around the globe.

That interest is threatened by the decision below and by the decision in *Kruman* v. *Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002). In both cases, plaintiffs alleged injuries arising in foreign commerce, *i.e.*, injuries resulting from sales to foreign purchasers that occurred in foreign countries.[2] Under well-established principles of antitrust standing, such injuries do not give rise to claims that may be heard in United States courts, because they are not "injur[ies] of the type the antitrust laws were intended to prevent." *Brunswick Corp.* v. *Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 489 (1977). Moreover, the Second and D.C. Circuits erred in holding that U.S. courts have subject-matter jurisdiction to entertain such cases, even though the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a, limits the jurisdiction of U.S. courts to cases in which plaintiffs' injuries arise from effects on U.S. commerce.

This expansion of antitrust standing and subject-matter jurisdiction, if affirmed, would increase global forum shopping. Plaintiffs – or more accurately, plaintiffs' counsel – will seek to turn U.S. district courts into world antitrust courts. If successful, their efforts will expose multinational businesses to unprecedented potential antitrust liability, or, even worse, to enormous "blackmail settlements" (in the words of Judge Friendly) – the arguable result in *Kruman*, in which certiorari was dismissed after the parties settled, rather than face continued uncertainty. See *Christie's Int'l PLC* v. *Kruman*, No. 02-340, cert. dismissed, 124 S. Ct. 27 (2003). Litigation of this kind will divert the resources of federal courts to cases that have no real effect on U.S. interests, but that have substantial effects on the interests of foreign governments, foreign producers, and foreign consumers. U.S. intrusion into such matters will increase diplomatic friction and disputes with foreign countries and, in the considered judgment of Executive Branch agencies, will undermine U.S. efforts to deter violations of the antitrust laws and to secure international cooperation to enforce the antitrust laws.

[2] As it happens, both cases have involved foreign sellers as well as foreign purchasers and transactions. Under our analysis of the FTAIA and related antitrust principles, however, a foreign plaintiff injured in a wholly foreign transaction may not bring a U.S. antitrust suit even against a U.S. seller.

STATEMENT

A. The FTAIA and Global Forum Shopping

Fearful that extraterritorial application of the U.S. antitrust laws could unduly impinge on the efforts of U.S. business to compete globally, and cognizant of the international comity ramifications of thoughtless extraterritoriality, Congress in 1982 enacted the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (FTAIA). The FTAIA was based largely on a recommendation by the Reagan Administration to *limit* the extent to which U.S. antitrust laws would apply to conduct involving trade or commerce with foreign nations. The FTAIA was a congressional response to international friction generated by expansive assertions of U.S. antitrust jurisdiction and to "complaints from American firms that the antitrust laws impaired their ability to increase exports through aggressive competition or cooperation." *The 'In' Porters, S.A.* v. *Hanes Printables, Inc.*, 663 F. Supp. 494, 498 (M.D.N.C. 1987); see also *Foreign Trade Antitrust Improvements Act: Hearings Before the House Comm. on the Judiciary, Subcomm. on Monopolies and Commercial Law*, 97th Cong., 1st Sess. (Apr. 8, 1981) (testimony of Martin F. Connor on behalf of the Business Roundtable) ("This uncertainty [about the reach of U.S. antitrust laws] affects the ability of American businesses to enter into international transactions

that would be highly beneficial and to compete effectively with foreign companies for a share of world markets.").

Amending the Sherman Act, the FTAIA provides (15 U.S.C. § 6a):

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless —
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect —
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

Since its enactment, plaintiffs have endeavored to chip away at the FTAIA's prohibition on the exercise of antitrust jurisdiction over foreign transactions with wholly foreign effects, asking courts to "expand the scope of the U.S. antitrust laws." Pet. App. 52a. See, *e.g.*, *Den Norske Stats Oljeselskap As* v. *HeereMac v.o.f.*, 241 F.3d 420 (5th Cir. 2001), cert. denied, 534 U.S. 1127 (2002); *Ferromin Int'l Trade Corp.* v. *UCAR Int'l, Inc.*, 153 F. Supp. 2d 700 (E.D. Pa. 2001); *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702 (D. Md. 2001); *Information Resources, Inc.* v. *Dun & Bradstreet Corp.*, 127 F. Supp. 2d 411 (S.D.N.Y. 2000); *The 'In' Porters*, 663 F. Supp. 494; *Liamuiga Tours, Div. of Carribean Tourism Consultants, Ltd.* v. *Travel*

Impressions, Ltd., 617 F. Supp. 920 (E.D.N.Y. 1985); *deAtucha* v. *Commodity Exchange, Inc.*, 608 F. Supp. 510 (S.D.N.Y. 1985); *Eurim-Pharm GmBH* v. *Pfizer, Inc.*, 593 F. Supp. 1102 (S.D.N.Y. 1984). The U.S. judicial system has many features that make suit in the United States more attractive than in foreign jurisdictions. See, *e.g.*, *Piper Aircraft Corp.* v. *Reyno*, 454 U.S. 235, 247 (1981) (more favorable U.S. tort laws are not a basis for suing in the U.S. for an airplane crash with no other connection to that forum); *Intel Corp.* v. *Advanced Micro Devices*, No. 02-572, cert. granted, 124 S. Ct. 531 (2003) (Ninth Circuit holding that 28 U.S.C. § 1782 permits mere complainants before foreign law-enforcement bodies to obtain discovery of their competitors by order of a U.S. District Court, even though no such discovery is allowed under the law of the relevant foreign jurisdiction). The attraction to U.S. courts is particularly strong in the antitrust context, where plaintiffs can take advantage of "jury trials, wide-ranging pretrial discovery without judicial supervision, enforcement by private plaintiffs, extraterritorial discovery, treble damages, class actions, [and] contingent fees." Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 516 (1998). "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." *Smith Kline & French Labs Ltd.* v. *Bloch*, [1983] 1 W.L.R. 730 (C.A. 1982) (Lord Denning).

These enticing features are exactly what drew plaintiffs in this case to sue in U.S. courts, rather than suing in the respective foreign jurisdictions – the Ukraine, Panama, Ecuador, and Australia – in which their injuries occurred. See Lily Henning, *Antitrust Goes Global: D.C. Circuit Opens the Door to Foreign Victims of Vitamin Price Fixing*, LEGAL TIMES, Oct. 13, 2003 (quoting respondents' counsel Paul Gallagher). Unless courts adhere to the limitations embodied in traditional principles of antitrust standing and in the scope of jurisdiction under the FTAIA, U.S. courts will attract litigants from around the world. "[A]ny entities, anywhere, that were injured by any conduct that

also had sufficient effect on United States commerce could flock to United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States." *HeereMac*, 241 F.3d at 427-428.

B. The Proceedings Below and in *Kruman*

First *Kruman*, and then the decision below, have upset the balance in global antitrust enforcement by permitting U.S. antitrust laws, judicial procedures, and remedies to be invoked by foreign plaintiffs against foreign defendants for injuries suffered in transactions occurring in foreign countries.

Kruman arose from the corporate leniency policies of the Antitrust Division, under which the first firm to break from a cartel and cooperate in the prosecution of other cartel members may escape criminal prosecution by the Justice Department. See Pet. App. 78a. Using this policy, the Antitrust Division uncovered and successfully prosecuted price-fixing agreements among auction houses. See *In re Sotheby's Holdings, Inc.*, Fed. Sec. L. Rep. ¶ 91,059 (S.D.N.Y. Aug. 31, 2000) (noting that Christie's International PLC disclosed the price-fixing agreement). "This [FTAIA] issue has arisen precisely because of the successful detection and prosecution of international cartels by the Division and other antitrust agencies in recent years." Assistant Attorney General R. Hewitt Pate, *Anti-Cartel Enforcement, the Core Antitrust Mission* 10 (May 16, 2003), available at http://www.usdoj.gov/atr/public/speeches/201199.pdf. See also Raymond Krauze & John Mulcahy, *Antitrust Violations*, 40 AM. CRIM. L. REV. 241, 270-271 (2003) (crediting the leniency policy with the majority of U.S. cartel enforcement successes in recent years). Substantial criminal fines and jail sentences for the participants and their officers were imposed.

As often is the case with Antitrust Division anti-cartel enforcement efforts, private plaintiffs promptly brought "tag-along" actions, seeking treble-damages recovery under Clayton Act § 4, 15 U.S.C. § 15. See *Kruman*, 129 F. Supp. 2d at 622.

Similarly in the vitamins case now before the Court, governmental civil and criminal actions (both here and abroad) were followed by claims by domestic plaintiffs, claiming injury arising from the effect of the conspiracy on U.S. commerce, that are pending in a separate action in the D.C. District. Pet. App. 8a. At least some of the defendants and domestic plaintiffs have reached settlement agreements. See *In re Vitamins Antitrust Litig.*, No. 99-mc-00197-THF. In *Kruman*, the domestic plaintiffs and the defendants reached a settlement agreement. *Kruman*, 284 F.3d at 390. Thus, both in this case and in *Kruman*, the claims of the foreign plaintiffs claiming injury arising from wholly foreign effects have been separated from the claims brought by domestic plaintiffs.

The district courts for both the Southern District of New York and the D.C. District dismissed the claims by the foreign plaintiffs in their respective cases, on the grounds that the FTAIA excludes from the jurisdictional reach of the Sherman Act claims based on wholly foreign effects. Pet. App. 49a, 52a; *Kruman* v. *Christie's Int'l PLC*, 129 F. Supp. 2d 620, 625 (S.D.N.Y. 2001). Neither district court addressed the question of antitrust standing.

On March 13, 2002, the Second Circuit reversed the holding by the district court for the Southern District of New York, for the first time since the enactment of the FTAIA holding that U.S. antitrust law extends to foreign plaintiffs with injuries arising from wholly foreign effects of anticompetitive conduct. *Kruman*, 284 F.3d at 390, 399-400. Less than a year later, the D.C. Circuit followed suit. "We hold that, where the anticompetitive conduct has the requisite effect on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce." Pet. App. 20a. The court below expressly rejected the contrary holding by the Fifth Circuit in *HeereMac* (Pet. App. 20a), that the FTAIA permitted suit only by plaintiffs injured in domestic U.S. commerce.

The *Kruman* court reached the extreme conclusion that jurisdiction was available under the FTAIA based on a completely abstract U.S. "effect," even if *no* plaintiff could claim an *injury* arising from an effect on domestic U.S. commerce. 284 F.3d at 400 ("Rather than require that the domestic effect give rise to an injury that would serve as the basis for a Clayton Act action, subsection 2 of the FTAIA only requires that the domestic effect violate the substantive provisions of the Sherman Act."). And, like the district court decision that it reversed, the Second Circuit nowhere addressed this Court's antitrust standing requirement from *Brunswick*, that suit is permitted only if the injury alleged is "of the type the antitrust laws were intended to prevent." 429 U.S. at 489.

The D.C. Circuit in this case took a view "somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to the latter than the former." Pet. App. 20a. The court held that, if *some* plaintiff had a claim arising from an effect on domestic U.S. commerce, *any* plaintiff could sue alleging injury from the violation based on effects felt *anywhere* in the world. *Ibid.* ("The conduct's domestic effect * * * need not necessarily give rise to the particular plaintiff's (private) claim."). Therefore, although the plaintiffs claiming injury from domestic effects were not part of the appeal to the D.C. Circuit, jurisdiction existed over claims by the foreign plaintiffs, alleging injury from wholly foreign effects. *Id.* at 33a.

The court advanced three primary rationales. First, based on what it viewed as the literal interpretation of the word "a," the majority read the phrase in Section 6a(2), "gives rise to a claim," to mean that *any* claim – whether or not part of the same action – must confer jurisdiction. Pet. App. 20a. Second, on the basis of legislative history indicating that the situs of the conduct at issue – and the nationality of the plaintiffs – did not alter the jurisdictional analysis, the majority concluded that the location of the *effects* giving rise to the plaintiffs' claims was irrelevant. *Id.* at 28a-29a. Third, the majority relied on a deterrence rationale. *Id.* at 33a.

Judge Henderson dissented, interpreting the FTAIA by reference to a "more natural" interpretation of the "plain language" of Section 6a(2). Pet. App. 40a, 42a. In her view, "gives rise to a claim" refers to the claim brought by the plaintiff before the court. She read the same legislative history cited by the majority as unambiguous: "'[T]he "effect" providing the jurisdictional nexus must also be the basis *for the injury alleged* under the antitrust laws.'" *Id.* at 40a (quoting H.R. REP. NO. 97-686, at 11-12 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2496-2497). Judges Sentelle and Randolph joined Judge Henderson in voting for *en banc* rehearing.

Apart from its reading of the FTAIA that expanded the jurisdictional reach of the Sherman Act, the D.C. Circuit also held that the FTAIA amended the antitrust standing doctrine. The court held that, because the "global conspiracy harms U.S. commerce, the mere fact that the foreign purchasers bought vitamins solely in foreign markets does not mean that the foreign purchasers lack standing to sue" (*id.* at 35a) – announcing a new derivative standing rule. Thus, according to the court below, both jurisdiction and standing can be considered derivative rights, supported by reference to someone other than the plaintiff: "[T]he plaintiff must" only "allege that *some* private person or entity has suffered actual or threatened injury as a result of the U.S. effect of the defendant's" antitrust violation. Pet. App. 23a (emphasis added). Because the *Kruman* court did not discuss standing, the court below is the only court, since the enactment of the FTAIA, to have held that foreign plaintiffs not injured in domestic commerce have *standing* to sue under the U.S. antitrust laws.

C. The International Concern Caused by this Case and *Kruman*

The U.S. government, foreign governments, and multinational businesses are alarmed at the expansive decisions of the Second Circuit and the court below. The Antitrust Division, Federal Trade Commission, and Solicitor General filed a brief urging rehearing *en banc* by the D.C. Circuit. The U.S.

government – arguing that the Fifth Circuit correctly interpreted the FTAIA in *HeereMac* (Pet. App. 74a) – expressed special concern that the D.C. Circuit's decision would *undermine* cartel-enforcement efforts by the Antitrust Division (*id.* at 77a-79a). Participants in price-fixing conspiracies will be deterred from availing themselves of the corporate leniency policy (see p. 6, *supra*) because the certainty of overwhelming civil liability to a worldwide purchaser class is a greater concern than the possibility of criminal liability if a conspiracy is detected by the Antitrust Division. *Id.* at 79a. "By permitting suits for treble damages by foreign plaintiffs whose injuries arise from conduct *outside U.S. commerce*, the present appellate majority view may create a potentially serious disincentive for corporations and individuals to report antitrust violations under our Corporate Leniency Policy or, when amnesty under the policy is unavailable, to cooperate with prosecutors by plea agreement." Deputy Assistant Attorney General Makan Delrahim, *Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications* 9 (Nov. 18, 2003) (*Delrahim Remarks*), available at http://www.usdoj.gov/atr/public/speeches/201509.pdf. Respondents' counsel recognizes that this is no idle concern: "'It's a very, very significant case in terms of the implications for both domestic and foreign companies that do business in the United States,' says Paul T. Gallagher, the plaintiff's lawyer. * * * 'It really increases the potential downside, the potential damages that a foreign defendant is exposed to in a U.S. court.'" Michael Freeman, "Here Comes Treble," *Forbes*.com, Aug. 27, 2003, available at http://www.cmht.com/casewatch/cases/itnTreble.html.

The Antitrust Division also has expressed concern that such extraterritorial assertions of jurisdiction will interfere with the conduct of U.S. international relations, which the Constitution commits to the political branches. "The more that the conduct of foreign businesses in foreign countries becomes subject to the regulatory effect of decisions by United States courts, the more our antitrust laws risk impinging inappropriately on the economic policies and sovereignties of foreign countries."

Delrahim Remarks 8. This, too, is a very real and pressing concern. "[J]ust last month when I participate[d] in the OECD's forum in Paris, I was shocked by the level of attention and concern the *Empagran* line of cases have attracted in the international community." *Id.* at 9-10. The Federal Republic of Germany filed a brief with this Court urging a grant of certiorari in this case. Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Petition for a Writ of Certiorari in *F. Hoffman-LaRoche Ltd.* v. *Empagran S.A.*, No. 03-724. That government pointed out that Germany and the European Union have sophisticated antitrust enforcement regimes and great regulatory interest in seeing their laws, not those of the United States or other countries, applied to conduct affecting commerce in Germany and the European Union. *Id.* at 1-2.

Foreign governments historically have lashed out against aggressive extraterritoriality. Australia, one of the countries whose own antitrust enforcement scheme has been shunted aside by the D.C. Circuit in this case, has a "blocking statute" that allows the blocking of the enforcement of foreign antitrust judgments. 1 SPENCER W. WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 4.17 (3d ed. 1997). Moreover, Australia employs "clawback" provisions that create a cause of action to recover money paid under a foreign antitrust judgment deemed by Australia to be unenforceable. *Ibid.* The United Kingdom likewise has defensive statutory provisions to protect persons doing business in the United Kingdom from foreign antitrust overreaching. *Ibid.* (citing the Protection of Trading Interests Act of 1980, 21 I.L.M. 834, 835, 836-837 (1982)).

Finally, the decisions in *Kruman* and in this case present a threat to international businesses like members of *amici*. Imposing antitrust liability for wholly foreign effects potentially disadvantages international business – or at least reverts to the state of uncertainty that existed prior to the enactment of the FTAIA (see pp. 3-4, *supra*) – and discourages foreign companies from investing in U.S. operations, and U.S. companies from

engaging in foreign commerce. Both results have serious ramifications for domestic U.S. economic activity.

SUMMARY OF ARGUMENT

Respondents lack standing because they suffered no injury "'by reason of' that which made [petitioners' alleged conduct] unlawful." *Brunswick*, 429 U.S. at 488. The domestic, not the foreign, effects render the price fixing at issue a violation of U.S. antitrust law. A causal relationship is not enough to create antitrust standing, which turns on the nature of the *plaintiffs'* alleged injury, not someone else's.

Antitrust standing principles reflect the teachings of the larger body of standing law, which operates to ensure that the proper party is suing. In this area of standing law, as in all others, one cannot determine standing by focusing on the rights of persons not before the court *or* on the legality of the underlying conduct.

The prudential considerations that underlie standing doctrine have special force in this case. Potentially complex antitrust litigation to determine whether someone *not* before the court has suffered injury in the United States is highly undesirable, as are efforts to deal unnecessarily with witnesses and discovery outside the United States and problems of avoiding duplicate recoveries under U.S. law and the laws of other jurisdictions.

The court below misconstrued the FTAIA as well. The dissent below and the Solicitor General have advanced a reading of Section 6a's text that is both more natural and more consonant with the settled presumption against reading statutes to have extraterritorial effect. Respondents' and the D.C. Circuit's reading collides with the undisputed purpose of the FTAIA to *limit* extraterritorial assertions of U.S. antitrust jurisdiction.

The hyper-emphasis by the D.C. Circuit on the single word "a" preceding "claim" is unfaithful to this Court's teachings about how to read a statute as a meaningful text, rather than a

mere collection of words. The D.C. Circuit's policy argument that its interpretation would enhance deterrence is, if possible, even worse, elevating one goal of the antitrust laws above all other considerations *and* getting the deterrence calculus almost exactly backward. Furthermore, the D.C. Circuit's interpretation renders subsection (2) of Section 6a redundant.

The legislative history further supports petitioners' position, not respondents'. In particular, the very passage on which the D.C. Circuit erroneously relied makes clear that Congress's intent to protect foreign purchasers was limited to their activities *in the domestic marketplace*. Finally, the views of the Executive Branch deserve respect in this case raising delicate matters of international relations.

ARGUMENT

I. The Holding of the D.C. Circuit Should Be Reversed Because it Ignores, and Undermines, Decades-Old Understandings of Antitrust Standing Rules

"In a complex case it is usually wise to begin by deciding whether the plaintiff has standing to maintain the action." *Verizon Communications, Inc.* v. *Law Offices of Curtis v. Trinko*, No. 02-682, slip op. 1 (Jan. 13, 2004) (Stevens, J., concurring in the judgment). Consideration of this case can begin *and end* with that inquiry.

"Plainly, to recover damages respondents must prove *more* than that petitioner violated [the antitrust laws]." *Brunswick*, 429 U.S. at 486 (emphasis added). They must also show an injury that occurs "'by reason of' that which made the [conduct] unlawful." *Brunswick*, 429 U.S. at 488. Under either the D.C. Circuit's or the Second Circuit's construction of the FTAIA – indeed, any conceivable reading of 15 U.S.C. § 6a(1) – the conspiracy alleged here is unlawful only *by reason of* its U.S. effects. If effects were felt *only* in the Ukraine, Australia, Ecuador, and/or Panama, subsection (1) – and the preexisting antitrust standards it codifies – would indisputably preclude any

conclusion that *U.S.* antitrust law had been violated. Plaintiffs who allege injury arising from the effects of allegedly anticompetitive conduct on purely foreign transactions – effects irrelevant in deciding whether the underlying conduct is legal or illegal – do not have standing to recover for those injuries. "[F]oreign plaintiffs should not be able to extend the Sherman Act to markets and types of restraints which Congress has deliberately chosen not to cover." 2 WALLER, *supra*, § 13:23 (Supp. VI 2003).

There is no dispute that the FTAIA preserved the traditional notions of antitrust standing that were articulated in this Court's *Brunswick* holding. Nothing in the text of the FTAIA suggests any alteration of standing requirements, and the legislative history confirms that no alteration was intended: "[T]he Committee does not intend to alter existing concepts of antitrust injury or antitrust standing." 1982 U.S.C.C.A.N. at 2496. Respondents concede the point (see Br. in Opp. 22 ("Clause 2 [of the FTAIA] imports the requirements of 'antitrust standing' that a plaintiff may recover only for 'injur[ies] of the type the antitrust laws were intended to prevent.'") (quoting *Brunswick*, 429 U.S. at 489)) and the D.C. Circuit purported to apply the *Brunswick* rule. Pet. App. 35a. But the court below in fact paid no more than lip service to this Court's *Brunswick* decision.

A. Clayton Act § 4, 15 U.S.C. § 15, permits "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to recover treble damages. This Court consistently has held that Section 4 confers standing only to recover damages for injuries that occur "'by reason of' *that which made the [conduct] unlawful.*" *Brunswick*, 429 U.S. at 488 (emphasis added). A causal relationship between the injury and the illegal conduct – allegations that plaintiffs "are in a worse position than they would have been had [defendants] not committed those acts" (*Brunswick*, 429 U.S. at 486) – is not enough to provide standing; such an expansive notion of causation would "divorce[] antitrust recovery from the purposes of the antitrust

laws." *Id.* at 487. See Phillip Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1135 (1976) ("[A]n antitrust damage assessment cannot be divorced from thoughtful attention to the rationale for liability and the internal logic of the liability holding.").

This is so because a single course of conduct that violates the antitrust laws can have multiple *effects*, only some of which Congress sought to prevent when it enacted the antitrust laws. See *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S. 251, 262 n.14 (1972) ("The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."). In *Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 540 & n.44 (1983), the fact that exclusionary conduct harmed businesses that employed union labor was not enough to confer standing on the plaintiff union. The union's harm was felt in a different market from the one in which commerce was illegally restrained.

A predatory conspiracy that injures a competitor may cause harm to others that have business relationships with the competitor, but such harm does not constitute antitrust injury. See *Trinko*, slip op. 1-2 (Stevens, J., concurring in the judgment); *G.K.A. Beverage Corp.* v. *Honickman*, 55 F.3d 762, 766 (2d Cir. 1995) (no allegation of antitrust injury when the antitrust harm occurred in the wholesale market, and the harm to plaintiffs occurred in the retail market); *Hairston* v. *Pacific-10 Conference*, 893 F. Supp. 1485, 1491 (W.D. Wash. 1994) (souvenir sellers did not allege antitrust injury when their revenues decreased because of sanctions imposed by the athletic conference on the University of Washington football program). A price-fixing conspiracy may raise prices and decrease output, but a terminated whistleblower-employee is not injured by reason of that restraint. *Ostrofe* v. *H.S. Crocker Co.*, 740 F.2d 739, 749-750 (9th Cir. 1984) (Kennedy, J., dissenting) ("Ostrofe was not a competitor or consumer in the market affected by the price-

fixing conspiracy, and in relation to that price-fixing, Ostrofe's injury was therefore indirect."). A tying arrangement that harms competition in one geographic market may actually help competition in another. See 2 JAMES R. ATWOOD & KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 14.26, at 212 (2d ed. 1981). A price-fixing conspiracy may cause higher prices in a foreign market, subsidizing lower prices in the domestic market – but the harm felt in the foreign market does not provide a basis for suit in the United States. See *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 584 n.7 (1986).

Plaintiffs do not have standing to recover in these situations because their injuries are not "the type [of injury] that the statute was intended to forestall." *Wyandotte Co.* v. *United States*, 389 U.S. 191, 202 (1967). Antitrust standing turns on the "nature of the plaintiff's alleged injury" (*Associated General Contractors*, 459 U.S. at 538), not on the mere fact of an antitrust violation, the nature of that violation, or even injury in fact to the plaintiff. And a cognizable antitrust injury must be alleged even in the context of a *per se* antitrust violation. *Atlantic Richfield Co.* v. *USA Petrol. Co.*, 495 U.S. 328, 341-342 (1990) ("The *per se* rule is a method of determining whether § 1 of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under § 4 of the Clayton Act.").

B. "That which made [petitioner's conduct] unlawful" in this case was, under any reasonable reading of the law, the conduct's effect on U.S. commerce, not its effects outside the United States. 2 WALLER, *supra*, § 13:23 ("Congress has stated that [the Sherman Act] was intended, first, to protect the competitive health of domestic markets * * * and, second * * * to protect export opportunities for American-based firms."). The FTAIA makes clear that the Sherman Act "does not apply" to conduct involving foreign commerce unless that conduct has "a direct, substantial, and reasonably foreseeable effect" on domestic, import, or export commerce. Whether the conduct has *other*

effects – in particular, whether it restrains commerce that takes place solely within other countries (the effects that give rise to the injuries alleged by respondents in this case) – is completely irrelevant to the question whether the conduct is subject to the Sherman Act under the FTAIA. See *ibid.* ("[T]he Sherman Act prohibits some restraints and not others, and this conclusion should not change when a defendant is engaged in both classes of restraints. One is illegal under the Act. The other is not.").

Indeed, the requirement of a U.S. effect is the explicit premise of the D.C. Circuit's expansive notions of subject-matter jurisdiction under the FTAIA. In the D.C. Circuit's view, "the plaintiff *must* allege that some private person or entity has suffered actual or threatened injury *as a result of the U.S. effect* of the defendant's violation of the Sherman Act." Pet. App. 23a (emphasis added). But the D.C. Circuit erred by holding that U.S. effect "need not necessarily give rise to the particular plaintiff's private claim." Pet. App. 20a.

Antitrust standing principles reflect the teachings of the larger body of standing law, which operates to ensure that the proper party is suing.[3] 13 CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3531, at 338-339 (2d ed. 1984). Prudential standing doctrine, such as the *Brunswick* rule,

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[3] This Court specifically has tied the antitrust standing requirement to the doctrine at common law. "[A]s was required in common law damages litigation in 1890, the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Associated General Contractors*, 459 U.S. at 536. Judge Posner has commented: "There is nothing esoteric about the *Brunswick* rule. It is the application to antitrust law of venerable principles of tort causation illustrated by *Gorris* v. *Scott*, 9 L.R. Ex.-125 (1874). The plaintiff's animals, which were being transported on the deck of the defendant's ship, were washed overboard in a storm. They would have been saved if the deck had been penned, as required by statute. But since the purpose of the statute was to prevent contagion, not drowning, the defendant was not liable." *Jack Walters & Sons Corp.* v. *Morton Building, Inc.*, 737 F.2d 698, 708-709 (7th Cir. 1984).

requires that the plaintiff be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing Serv. Orgs.* v. *Camp*, 397 U.S. 150, 153 (1970).[4] "What the plaintiff must show is 'a wrong' to herself; *i.e.*, a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to any one." *Palsgraf* v. *Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928) (Cardozo, J.).

The zone of interests that the antitrust laws protect always has been limited to effects in the United States, even if the conduct producing those effects has occurred in whole or in part outside of the United States. See *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796 n.23 (1993) ("The FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy."); *Matsushita*, 475 U.S. at 584 n.7 (plaintiffs failed to state a claim under the Sherman Act based on an alleged worldwide conspiracy where plaintiffs could not prove "that petitioners conspired to price predatorily in the American market"); *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (Hand, J.) (*Alcoa*) ("We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States."). The antitrust laws, in the words of Section 1 of the Sherman Act, 15 U.S.C. § 1, protect commerce "among the several States, or with foreign nations," not commerce within or among foreign nations.

In holding that respondents had standing to pursue their claims in this case, the D.C. Circuit fundamentally misconstrued the nature of the relevant antitrust standing inquiry. The D.C. Circuit's standing analysis focused on the legality of the challenged conduct, rather than the nature of the plaintiffs' injuries: "The antitrust laws do not merely forbid price-fixing in U.S. commerce, but rather forbid price-fixing that harms U.S. commerce." Pet. App. 35a. That statement simply does not address the relevant question. The proper standing inquiry "focuses on the question of whether the litigant is the proper party to fight the lawsuit, not whether the issue itself is justiciable." BLACK'S LAW DICTIONARY 1405 (6th ed. 1990) (citing cases); see, *e.g.*, *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997) ("The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit * * *."). The D.C. Circuit's conclusion that the defendant's *conduct* is forbidden sheds no light on whether *this plaintiff's injury* is the type of injury that Congress sought to prevent through enactment of the Sherman Act. Under any plausible reading, the FTAIA's requirement of effects in domestic commerce supports the clear rule that injuries arising from the U.S. effects of antitrust violations fall within the ambit of Congress's concerns, and that injuries arising from other effects – the kind of injuries alleged by respondents – do not.

C. The prudential considerations that underlie standing rules, both under the antitrust laws and in other contexts, have special force in the context of claims for injuries suffered by foreign buyers in transactions occurring in foreign countries. To begin with, such claims, under the constructions of the FTAIA adopted by the D.C. Circuit and the Second Circuit, are entirely dependent on the existence of some *other* claim that is based on U.S. effects. Even in a purely domestic context, such derivative standing is suspect.

> Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation. The reasons are two. First, the courts should not adjudicate such rights unnecessarily. * * * Second, third

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[4] The Court in *Data Processing* interpreted Section 10 of the Administrative Procedure Act, which permits judicial review to be initiated by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action" (5 U.S.C. § 702) – language very similar to Clayton Act § 4, 15 U.S.C. § 15 ("any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor").

parties themselves usually will be the best proponents of their own rights.

Singleton v. *Wulff*, 428 U.S. 106, 113-114 (1976).

In the present context this derivative standing is even more problematic. The trial court surely cannot assume the validity of a non-party's claim merely on the basis of the plaintiff's pleadings. To do so would eviscerate the requirement that the court have a factual basis for asserting jurisdiction. But, to find that the U.S. effects of the defendant's conduct give rise to a claim, the court would need to receive evidence and make a factual determination about the validity of the *other* claim. The D.C. Circuit "gave no explanation how the determination whether the domestic effect gives rise to a claim by 'someone' is to be made when that 'someone' is not before the court." *Delrahim Remarks* 6. If such a determination is even possible, evaluation of this second claim would undoubtedly threaten "the strong interest * * * in keeping the scope of complex antitrust trials within judicially manageable limits." *Associated General Contractors*, 459 U.S. at 543. It would require, in essence, the adjudication of two cases, rather than one.

That strong interest in judicial manageability also will be jeopardized by the fact that the parties, witnesses, and documentary evidence with respect to the plaintiffs' claims will be located outside of the United States. Intractable discovery problems are likely, and even the simplest of issues may be complicated by the need to translate testimony and documents from a foreign language into English. Concerns such as unmanageable class action litigation and a tidal wave of litigation in the district courts also are implicated by the decision below. "[M]ost obviously, [*Kruman* and *Empagran*] will encourage more class action lawsuits in our already-crowded federal courts by *foreign* plaintiffs who claim antitrust injuries from conduct *outside* the United States." *Delrahim Remarks* 7. As this Court has recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a

meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). Judge Friendly termed this the "blackmail settlement." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973). And worldwide classes substantially magnify these concerns. Indeed, the size of potential liability is likely the primary reason the defendants in *Kruman* settled, rather than pursue their certiorari petition before this Court.

Prudential standing rules also reflect "the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Associated General Contractors*, 459 U.S. at 543-544. A standing doctrine that requires U.S. courts to award antitrust damages for conduct that directly and immediately affects victims in another country presents the concern of duplicate recovery, because foreign victims may seek damages in that other country, *in addition to* seeking damages through U.S. courts. Largely at the direct encouragement of the United States (see William E. Kovacic, *Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy*, 74 ST. JOHN'S L. REV. 361, 362 (2000)), nearly 100 foreign jurisdictions have adopted their own antitrust enforcement regimes. *Delrahim Remarks* 2. This is true of three of the four nations where the effects alleged in this case occurred – the Ukraine, Panama, and Australia. See http://www.globalcompetitionreview.com/home/links.cfm (visited Jan. 23, 2004). Private damages actions have been filed overseas, including a class action in Australia. Pet. 5. It is possible that duplicate recoveries can be avoided through mechanisms similar to those U.S. courts would use to deal with the same problems – indeed, some foreign countries can be expected to go ever further in that direction and allow defendants to "claw back" two-thirds of what plaintiffs recovered in the United States (see p. 11, *supra*) – but figuring out *how* to avoid duplication is neither a small task (especially if the plaintiff recovered damages in the United States not as a named plaintiff but as a member of a certified class) nor one that U.S. courts can

expect foreign courts to handle in a uniform and consistent manner. Unmanageability and unpredictability are thus additional reasons why it is a bad idea to depart from the simple concept that those who may sue under U.S. antitrust law are those who suffer injury by reason of that which makes the defendants' conduct unlawful, which in this context is the domestic effects of the conduct.

D. Contrary to the apparent belief of the D.C. Circuit (Pet. App. 30a-32a), this Court's decision in *Pfizer Inc.* v. *Government of India*, 434 U.S. 308 (1978), does not even remotely undermine the standing analysis above. *Pfizer* stands for the narrow proposition that foreign governments are "persons" entitled, by the plain language of Clayton Act § 4, to enforce the antitrust laws through private lawsuits in U.S. courts. 434 U.S. at 320; see *HeereMac*, 241 F.3d at 430 ("Indeed, *Pfizer*'s narrow holding was 'only that a foreign nation *otherwise entitled to sue in our courts* is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff.'") (quoting 434 U.S. at 320). *Pfizer* never has been interpreted to abrogate the *Brunswick* rule, adopted unanimously less than a year earlier, and the legislative history of the FTAIA contains approving references to each decision – demonstrating that Congress did not consider them to be in tension. See 1982 U.S.C.C.A.N. at 2495 (citing *Pfizer* for the proposition that "[f]oreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do"); *id.* at 2496 (citing *Brunswick* for the proposition that "the mere fact that an exporter may be adversely affected in a financial sense by the activities of another would not necessarily mean that he has sustained an injury for which he may recover under Section 4").

Pfizer's "deterrence" rationale also does not support a loosening of traditional standing rules. *Every* limitation on standing will reduce the number of potential claims against an antitrust wrongdoer, and in that limited sense could be said to undermine deterrence of antitrust violations, but that is hardly sufficient

reason to abandon those well-established rules. This Court was well aware of the importance of deterrence when deciding *Brunswick*. "Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed." 429 U.S. at 485. Nevertheless, "entirely fortuitous" recovery under Section 4 was not permitted (*id.* at 487) even though the possibility of such recovery might enhance deterrence. There is no reason to alter the balance between interests that this Court struck in *Brunswick*.

II. The FTAIA Limits the Subject-Matter Jurisdiction of U.S. Courts Applying U.S. Antitrust Laws, and Does Not Permit Suits by Foreign Plaintiffs Alleging Injury from Wholly Foreign Effects

A. Contrary to the views of respondents and the court below, the natural reading of Section 6a limits antitrust jurisdiction unless the plaintiffs allege injuries arising from effects in domestic commerce. At the threshold, the court below failed to recognize that undue extraterritorial application of a statute is disfavored. "It is a long-standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC* v. *Arabian-American Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*) (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)). "We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is 'the affirmative intention of the Congress clearly expressed,' we must presume it 'is primarily concerned with domestic conditions.'" *Ibid.* (quoting *Foley Bros.*, 336 U.S. at 285, and *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

Of course, no dispute exists that the FTAIA expressly permits extraterritorial application of the Sherman Act in the sense of allowing antitrust actions against conduct undertaken overseas with U.S. effects. But, until *Kruman* and the decision below, no court had interpreted the Sherman Act, or the FTAIA,

to allow actions by foreign plaintiffs claiming injury felt wholly in foreign commerce.

Applying the *Aramco* presumption to the interpretation of the FTAIA, this Court should approach with great caution respondents' urging to read the Act to *broaden* the extraterritorial reach of the Sherman Act beyond what was accepted before its enactment. Respondents' argument in this case is especially suspect, because the argument is based on a strained reading of the statute that places enormous emphasis on the single word "a" and substitutes an inquiry into the situs of a defendant's *conduct* for the required inquiry into the location of the *effect*. See *HeereMac*, 241 F.3d at 427-428.

Respondents also face a substantial uphill battle to overcome Congress's manifest intent to *limit* the reach of the Sherman Act. The purpose of the *Aramco* rule – to "protect against unintended clashes between our laws and those of other nations which could result in international discord" (499 U.S. at 248) – is implicated in this case as well. As the Antitrust Division and the Federal Republic of Germany have already observed, the concern for diplomatic friction caused by the ruling below is substantial. See pp. 10-11, *supra*. "[W]e are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.' We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." *Alcoa*, 148 F.2d at 443.

B. Only through a "strict constructionist" reading could a court interpret the word "a" to reverse long-settled antitrust law principles. Such an absurd hyper-emphasis on the word "a" undermines any attempt to construe the FTAIA "reasonably, to contain all that it fairly means." ANTONIN SCALIA, A MATTER

OF INTERPRETATION 23 (1997).[5] Placing such reliance on the word "a" violates this Court's admonition (stated in a unanimous reversal of another D.C. Circuit decision) that "text consists of words living 'a communal existence,' in Judge Learned Hand's phrase, the meaning of each word informing the others and 'all in their aggregate tak[ing] their purport from the setting in which they are used.'" *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993) (quoting *NLRB* v. *Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941)). In its interpretation of Section 6a, the D.C. Circuit again did just what this Court has disapproved. See also Edward D. Cavanagh, *The FTAIA and Subject Matter Jurisdiction Over Foreign Transactions Under the Antitrust Laws*, 56 SMU L. REV. 2151, 2180 (2003) ("The plain meaning rule is a canon of statutory interpretation designed to assist courts in construing statutes; it is a tool, not a trump card.").

The court below reached its interpretation of Section 6a by blindly following a deterrence rationale, without considering seriously where blind pursuit of deterrence might lead. Initially, as the Solicitor General and the Antitrust Division have said, the holding below *undermines*, rather than supports, important antitrust enforcement goals. See p. 10, *supra*. Even if deterrence were a policy underlying the FTAIA, this Court disapproves such unbridled pursuit of a single statutory purpose. See *PBGC* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990) ("'[N]o legislation pursues its purposes at all costs * * * – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.'") (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam)). Of course, interpreting the FTAIA (or any statute) by simplistically assuming that a policy that *does not* further the statute's primary intent is the law is utterly insupportable. No matter how virtuous the court

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[5] Such a reading would be the paradigm of "so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute." SCALIA, *supra*, at 23.

below believes the policy may be, a deterrence rationale that Congress did not discuss may not trump all appropriate interpretations of the statutory text and the legislative history.

This Court has refused to be led by the goal of deterrence into expanding the reach of the antitrust laws to apply to conduct that Congress did not intend them to cover. See *Trinko*, slip op. 12. The Court noted especially that the presence of alternate schemes that "perform[] the antitrust function" militates against "recognizing an expansion of the contours" of the antitrust laws. *Ibid.* The alternate schemes present in this case are the scores of foreign antitrust laws "designed to deter and remedy anticompetitive harm" (*ibid.*) – in spite of which the court below somehow felt that deterrence was inadequate. As the Antitrust Division has articulated, "European Union, Canadian, and Australian authorities similarly have obtained record fines against the vitamin companies." Pet. App. 68a.

A holistic approach (see *United Savs. Ass'n* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)) to understanding the text of Section 6a, by contrast, produces a defensible interpretation of the FTAIA. The Act makes clear that only claims based on injury caused by the "direct, substantial, and reasonably foreseeable effect[s]" on U.S. commerce of a Sherman Act violation would come within the subject-matter jurisdiction of U.S. courts.

Congress did so by requiring that, to bring any suit under the antitrust laws alleging "conduct involving trade or commerce * * * with foreign nations," the plaintiff must plead and prove two elements. The first element is "a direct, substantial, and reasonably foreseeable effect" on domestic or export commerce. 15 U.S.C. § 6a(1). The second element is that "such effect gives rise to a claim" under the Sherman Act. *Id.* § 6(a)(2). Under the D.C. Circuit's interpretation of Section 6a, this second element arguably is redundant. Virtually by definition, *any* agreement in restraint of trade that has "a direct, substantial and reasonably foreseeable effect" on domestic commerce will give rise to an antitrust claim by *someone*. This

Court should not countenance a reading of the FTAIA that writes Section 6a(2) out of the statute. See *Alaska Dep't of Env'tl Conservation* v. *EPA*, No. 02-658, slip op. 23 n.13 (Jan. 21, 2004) ("[A] cardinal principle of statutory construction [is] that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotations omitted); *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("Although the State's hypertechnical reading of the nondiscrimination clause is not inconsistent with the language of that provision examined in isolation, statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

Instead, interpreting Section 6a "reasonably, to contain all that it fairly means," the Court should consider the "gives rise to a claim" language to be Congress's effort to make clear that the claim of *the plaintiff invoking the subject-matter jurisdiction* of the federal court must be predicated on a direct, substantial and reasonably foreseeable effect on U.S. commerce. "The more natural reading of the statutory language, I believe, is the narrower one adopted by the district court below and by the Fifth Circuit in [*HeereMac*], under which the phrase 'gives rise to a claim' refers to the claim advanced by the plaintiff in the action before the court." Pet. App. 40a (Henderson, J., dissenting).[6]

Respondents suggest (Br. in Opp. 22) that Congress inserted the language in Section 6a(2) simply to reaffirm the *Brunswick* doctrine. Even if respondents' argument were cor-

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[6] See also Cavanagh, *supra*, at 2182 ("The most logical reading of § 6a(1) and § 6a(2) is that § 6a(1) requires that anticompetitive effects be 'direct, substantial and reasonably foreseeable;' and § 6a(2) requires that anticompetitive acts that create a basis for subject matter jurisdiction be the same acts which gave rise to the claim asserted.").

rect, the argument would lead to reversal. As discussed above (pp. 13-23, *supra*), the *Brunswick* antitrust standing rule *itself* contradicts the decision below. But respondents' interpretation of Section 6a(2) is not correct in any event. Not a word in either clause of the statute refers to (or even echoes) the *Brunswick* doctrine. If Congress had wished by this language to reaffirm *Brunswick*, presumably it would have referred specifically to *anticompetitive* effects, as distinct from *neutral*, or *procompetitive*, effects. It would have been entirely unnecessary for Congress to reaffirm *Brunswick* in any event, because *Brunswick* is clearly grounded in the text of Clayton Act § 4 (429 U.S. at 488), and nothing about the FTAIA disturbs Section 4. Finally, Congress would have no reason to "import the requirement of 'antitrust standing'" (Br. in Opp. 22) into the FTAIA, but not into other aspects of the antitrust laws. Rather than taking the needless step of dealing with *Brunswick* in the FTAIA, Congress clarified its intent on this subject in the legislative history and left untouched the language of Section 4.

C. The legislative history also "unambiguously support[s]" (Pet. App. 40a (Henderson, J., dissenting)) the conclusion that "gives rise to a claim" in Section 6a(2) refers not to just *any* claim, but to *the* claim advanced by *that* plaintiff. This was the result reached by the Fifth Circuit in *HeereMac*, by the district court below, and by Judge Henderson in dissent – as well as by several other district courts (see Pet. App. 50a (citing cases))[7] – after their own careful analyses of the legislative history.

The House Report states clearly that "the 'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws." 1982 U.S.C.C.A.N. at 2496-2497. The court below justified its contrary holding by quoting other language in the legislative history:

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[7] See also *Ferromin Int'l Trade Corp.* v. *UCAR Int'l, Inc.*, 153 F. Supp. 2d 700, 706 (E.D. Pa. 2001); *The 'In' Porters*, 663 F. Supp. at 598-600; *Liamuiga Tours*, 617 F. Supp. at 923-924; *Eurim-Pharm*, 593 F. Supp. at 1107.

> "The intent of the Sherman and FTC Act amendments in H.R. 5235 is to exempt from the antitrust laws *conduct* that does not have the requisite domestic effects. This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States – *e.g.*, price fixing not limited to the export market – would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The *conduct* has requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. *Cf.*, *e.g.*, [*Pfizer*, 434 U.S. 308]. Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do."

Pet. App. 29a (quoting 1982 U.S.C.C.A.N. at 2495). But the quoted passage only makes clear that the *place* where the injury is suffered, and the nationality of the injured party, does not prevent a private claim based on effects "in the *domestic marketplace*." See Pet. App. 41a (Henderson, J., dissenting). In fact, the last sentence quoted above might be thought dispositive of respondents' argument. The plaintiffs in this case do not even claim to seek "protection * * * in the domestic marketplace." Rather, they seek the protection of U.S. antitrust laws in various foreign marketplaces – in the Ukraine, Panama, Ecuador, and Australia. *No authority – anywhere* – supports granting the plaintiffs that right. See *In re Microsoft Corp.* 127 F. Supp. 2d at 716 ("Nothing is said about protecting foreign purchasers in foreign markets.").

This unequivocal language in the legislative history supports the natural, plain meaning of the text of Section 6a. No basis exists to interpret the legislative history as the majority did below, to grant jurisdiction and standing where none previously existed.

D. It is significant that the Executive Branch agrees with this interpretation of the FTAIA. The issues in this case raise delicate matters of international relations, and in such matters

the Court has always paid special heed to the views of the Executive Branch. See, *e.g.*, *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 385-386 (2000) ("Although we do not unquestioningly defer to the legal judgments expressed in Executive Branch statements when determining a federal Act's preemptive character, we have never questioned their competence to show the practical difficulty of pursuing a congressional goal requiring multinational agreement.") (citation omitted). Indeed, in *Hartford Fire*, 509 U.S. 764, this Court resolved an issue of international comity in antitrust in accordance with the *amicus* views of the United States (which supported the plaintiffs). In *Pfizer*, 434 U.S. at 319 & n.20, the Court took pains to note that "the result we reach does not require the Judiciary in any way to interfere in sensitive matters of foreign policy" and supported that statement by observing in a footnote that the State Department had advised that it did not "anticipate any foreign policy problems" from a resolution of that case in favor of the plaintiffs.

Here, in marked contrast, the government has stated that a statute designed to protect American businesses *and* decrease international friction *was* interpreted incorrectly by the D.C. Circuit, presenting possible problems for U.S. international relations. Because the statute being construed inherently touches on sensitive matters of foreign relations, the Court should give great weight to the views of the Executive Branch. In any event, for all the reasons given in this brief and in the petitioners' and other supporting *amici*'s briefs, there is more than sufficient reason, on any of several different grounds, to reverse the decision below.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBIN S. CONRAD
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ROY T. ENGLERT, JR.
Counsel of Record
DONALD J. RUSSELL
MAX HUFFMAN
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

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